IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 500 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SANABHAI KHUSALBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 500 of 1993
(MR VIVEK BAROT) for Petitioners No. 1-2
MR JM BUDHBHATTI appointed as amicus curie
MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 15/01/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. In this appeal the appellants have challenged their respective orders of conviction and sentence passed by the Ld. Addl. Sessions Judge, Kheda at Nadiad dated 22/3/1993 in Sessions Case No. 36 of 1992. The appellant no. 1 is convicted for offence u/S. 302 of the Indian Penal Code (for short 'IPC') and he has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.2,000/-, in default further RI for six months. He has also been convicted for offence made punishable u/S. 324 of the IPC as well as section 135 of the Bombay Police Act, for which no separate sentence has been imposed. So far appellant no. 2 is concerned, he has been convicted for offence made punishable u/S. 324 of the IPC as well as section 135 of the Bombay Police Act and he has been sentenced to suffer RI for six months and to pay fine of Rs.1,000/-, in default further RI for three months and also to pay fine of Rs.500/-, in default to undergo SI for eight days for respective offences. Both the appellants have been acquitted from all the other charges levelled against them.

2. The incident in question took place on 18/10/1991 at about 12.30 after midnight. According to the prosecution it was Dashera festival night and according to the rites and rituals the residents of village Pahadia were required to take out a chariot (Rath) procession and the chariot was supposed to be taken to the temple of Bhathiji Maharaj. One Pratapbhai Dhulabhai was watching the chariot being decorated by his father in front of his residence. At that time several other persons were also standing there. It is the case of the prosecution that the present appellants alongwith five other original accused came there armed with weapons like Dhariya and sticks. Immediately on arrival appellant no. 1 gave a Dhariya blow on the one side of the leg of one Parbatbhai Aitabhai. He, therefore, raised the shout. On hearing his shout, Dhulabhai, father of Pratapbhai, who was decorating the chariot at that time immediately went to help Parbatbhai Aitabhai. However, appellant no. 1 delivered one Dhariya blow on head from the back side of Dhulabhai. On receiving the blow Dhulabhai returned and went upto distance of about 25 to 30 steps and then fell down. Immediately thereafter the present appellants as well as the original accused ran after Dhulabhai. According to the prosecution present appellants as well as original accused nos. 3 and 7 were having Dhariyas, whereas original accused nos. 4, 5 and 6 were having sticks with them. While the attack was going on, one

Savitaben Aitabhai also came there alongwith Revaben and Ramabhai Punjabhai. Appellant no. 2 gave a blow with Dhariya on the left waist of Savitaben and original accused no.6 gave a blow with stick on the right hand palm of Revaben. Original accused no. 7 gave a blow with Dhariya on the front side of the head of Ramabhai Punjabhai. According to the prosecution, after completing the assault the appellants as well as the original accused ran away from the scene of offence. The entire incident took place in the vicinity of temple of Bhathuji.

2.1. Parbatbhai who watched the incident from near the Bhathuji temple immediately procured a vehicle, namely matador for removing the injured persons to the hospital. Since Dhulabhai had died on the spot, his body was allowed to remain at the scene of offence. In the matador Savitaben, Revaben, Parbatbhai and Ramabhai first went to Mehmadavad Police Station, where the Police Sub Inspector on duty Mr. Kalubhai Tapubhai Manjaria was given the FIR by Pratapbhai Dhulabhai at about 6.00 a.m. which was duly recorded by him. The injured witnesses were thereafter sent to the hospital alongwith Yadi for treatment.

2.2. On receipt of the FIR the P.S.I. registered the offence against the appellants and other original accused at C.R. No. I 253 of 1991 at Mehmadavad Police Station and commenced investigation. During investigation the Investigating Officer recorded statements of various persons conversant with the facts of the case, drew necessary panchnamas, got the autopsy done of the dead body of Dhulabhai, collected the medical certificates of the injured persons, etc. and at the end of the same, submitted chargesheet against the present appellants as well as the original accused for committing offences u/Ss. 147, 148, 149, 302, 323, 324 and 504 of the IPC and u/S. 135 of the Bombay Police Act. The chargesheet was submitted in the Court of the Ld. Judicial Magistrate First Class, Mehmadabad, who in turn committed the case to the Court of Sessions as the offence u/S. 302 is exclusively triable by the Court of Sessions.

3. At the trial the Ld. Addl. Sessions Judge, Kheda at Nadiad framed the charge against the appellants and other original accused for the offences mentioned above and read over the same to them. The appellants as well as the original accused denied the charge and claimed to be tried. After completion of the oral evidence, further statements of the appellants and other original accused were recorded u/S. 313 of the Code of Criminal Procedure

(for short 'Cr.P.C.'). Their defence appears to be of total denial.

4. At the end of the trial, the Ld. Judge came to the conclusion that the prosecution had duly proved that deceased Dhulabhai had died homicidal death. He also came to the conclusion that appellant no. 1 had caused serious injury to the deceased with the intention of causing his death and in fact he caused his death and thereby he committed offence u/S. 302 of the IPC. He further came to the conclusion that appellant no.1 was also guilty of committing offence u/S. 324 as well as u/S. 135 of the Bombay Police Act. Further the Ld. Judge came to the conclusion that so far appellant no. 2 was concerned, he had committed an offence u/S. 324 of the IPC and u/S. 135 of the Bombay Police Act. He, therefore, recorded order of conviction accordingly and imposed the sentence already stated above. So far the other original accused are concerned, they were acquitted of all the charges levelled against them. The appellants were also acquitted of other offences u/Ss. 147, 148, 149, etc.

5. The record of this appeal shows that the appellants were being represented by Mr. Vivek Barot. Upon his sad demise, office of this Court had issued notice to the appellants to enable them to make suitable alternative arrangement. However, it appears that despite service of the notice, they have chosen not to engage any advocate to represent them in this appeal. In the circumstances, when the appeal came up for hearing, we requested Mr. J.M. Budhbhatti to appear as amicus curie to render us assistance in deciding this appeal. Mr. Budhbhatti has not only willingly accepted this assignment, but has rendered valuable assistance to us.

5.1. At the hearing of the appeal he has submitted that the order of conviction and sentence passed by the Ld. Addl. Sessions Judge against the appellants are erroneous in as much as he has failed to appreciate that the prosecution has been unable to prove its case beyond any reasonable doubt. He has further submitted that the prosecution witnesses examined at the trial are all interested witnesses and their evidence, therefore, cannot be accepted. This is more so when the trial Court itself has come to the conclusion that their evidence in respect of other accused is not reliable. In other words he has submitted that the prosecution witnesses have falsely implicated as many as five persons in this case, hence their evidence cannot be relied on for the purpose of convicting the present appellants. In the alternative

he has submitted that even if appellant no. 1 is found responsible of committing the offence, the offence cannot be that of a murder, which is made punishable u/S. 302 of the IPC but a lesser offence. In support of this contention he has submitted that the evidence on record merely shows that there was exchange of words at the initial stage and the same ultimately resulted into fight between two parties in which two persons on the side of the accused have also received injuries and a cross case has been filed against some of the persons of prosecution side. In light thereof, according to him, it can well be said that the prosecution witnesses might have started the fight and appellant no. 1 can at the most be saddled with the liability of exceeding right of private defence. He has further submitted that though the accused have suffered injuries, the prosecution witnesses have not explained the same and on that sole count the case of the prosecution deserves to be thrown overboard. Lastly, he has submitted that this appeal is required to be allowed and the appellants are entitled to be acquitted.

5.2. As against that, Mr. H.H. Patel, Ld. APP appearing for the State has submitted that the evidence of prosecution witnesses and more particularly that of the eye witnesses is very clear and there cannot be any hesitation on the part of the Court to hold the appellants guilty of the offences for which they have been convicted by the trial Court. He has submitted that the prosecution has been able to prove its case against the appellants and they have been rightly convicted by the trial Court as stated above.

6. In support of their rival contentions both the learned counsels have taken us through the entire record of the case and we have also considered the evidence minutely with a view to appreciate it afresh.

7. The prosecution has examined Dr. Naishadh Bhanubhai Bhatt, P.W. 1 Exh. 13, who at the relevant point of time i.e. on 18/10/1991 was working as Medical Officer at Mehmadavad. According to him, on that day at about 12.45 a.m. dead body of Dhulabhai Punjabhai Sodha was brought by Police Constable Hathibhai Somabhai for its autopsy. It was commenced by him at 12.30 and completed at 1.30 p.m. He has also submitted during the course of evidence report of the post mortem examination conducted by him on the dead body of Dhulabhai, which is at Exh. 15 on the record of the case. In column no. 17 of the post mortem notes this witness has indicated the external injuries that were there on the body of Dhulabhai. According to him, there was incised wound on

inner side and right eye brow to right parietal bone 18 cm x 3 cm x 10 cm deep, which cut skin and muscles of the head, also cut frontal bone and right parietal bone. Brain material came out. He had found the edges of the injury regular and clean cut and in his opinion it was an injury caused by sharp cutting instrument. He also found fracture of the frontal as well as right parietal region. In the opinion of this witness, the cause of death was due to shock and haemorrhage as a result of injury on his body.

7.1. Looking to the evidence of this witness, it is very clear that Dhulabhai Punjabhai had died a homicidal death. In our opinion, therefore, the trial Court has not committed any error in holding that deceased Dhulabhai Punjabhai had died a homicidal death.

8. The question, therefore, requires our consideration is whether the prosecution has been able to successfully prove that it was appellant no. 1 who caused the death of Dhulabhai and if yes, whether his overt act constituted offence made punishable u/S. 302 of the IPC or any other lesser offence.

9. In support of its case the prosecution has examined four eye witnesses. They are Parbatsinh Aitabhai P.W. 3 Exh.36, Revaben Lallubhai P.W. 4 Exh.37, Savitaben Aitabhai P.W. 5 Exh.39 and Ramabhai Punjabhai P.W. 6 Exh.40. Over and above this, the prosecution has also examined Pratapbhai Dhulabhai P.W. 2 Exh.21, who lodged the complaint at the police station.

9.1. According to Parbatsinh Aitabhai P.W.3, on the night of the incident he was sitting near the temple of Bhathiji. At that time deceased Dhulabhai Punjabhai was decorating the chariot in front of his house. Many persons had gathered there at that time. While he was sitting there, appellant no. 1 came to him and told him why he was sitting there and why he did not light the lamps and so saying he started giving filthy abuses. He carried a Dhariya with him. The witness further states that since he declined to get up, appellant no. 1 gave a Dhariya blow on his neck. He immediately started bleeding. He raised shouts calling for help. He has further stated that his uncle Dhulabhai on hearing his shout immediately came to the place where he was sitting, leaving the work of chariot. When his uncle Dhulabhai came there, appellant no. 1 gave a Dhariya blow on his head. On seeing such assault he ran away and he was followed by his uncle upto distance of about 25 to 30 steps. He has further stated that after reaching there

Dhulabhai fell down on the ground near his house. He has further stated that at that time original accused nos. 4, 5 and 6 were having sticks, whereas the present appellants and accused nos. 2, 3 and 7 were having Dhariyas with them. He has further stated that the present appellant no. 2 caused injury to P.W. 5 Savitaben on the left hand; whereas other original accused caused injuries to Revaben, Ramabhai, etc. He has further stated that in the meanwhile many person from the village gathered and, therefore, the appellants as well as other original accused left the place. His uncle Dhulabhai had died on the spot, whereas other injured persons were taken to the hospital in a matador for treatment. In the cross-examination by the defence he has stated that it is not true that they caused injuries to themselves. Moreover, he has stated that no body from their side had caused any injury to accused. Though this witness has been crossexamined at length, the defence has not been able to elicit anything of importance to support its case.

9.2. The other eye witnesses, namely Revaben Lallubhai and Savitaben have also deposed on the same line and, therefore, we do not propose to reproduce their evidence here. However, we say that the evidence of these witnesses is very consistent and reliable and we cannot find any discrepancy in their evidence so as to give benefit of doubt to appellant. From the evidence of Savitaben Aitabhai, Revaben Lallubhai and Ramabhai Punjabhai, it clearly appears that atleast appellant no. 1 was responsible for committing the death of Dhulabhai Punjabhai and also for causing hurt to witnesses Revaben and Ramabhai.

10. We, therefore, now turn our attention to the question whether the offence committed by appellant no. 1 is punishable u/S. 302 of the IPC or any other lesser offence.

10.1. That the evidence of eye witnesses clearly show that initially some hot exchange of words had ensued between the parties which was ultimately culminated into physical fight between them. It is also in evidence that during the incident two persons on the side of the accused had also received injuries and when the prosecution witnesses had been specifically asked as to how the accused received injuries, the prosecution witnesses have deliberately suppressed this fact and have not explained the injuries on the person of the accused.

10.2. In this background of case, it clearly appears that either there was a free fight between the parties or the prosecution had deliberately suppressed the origin of the incident. In other words, they have not come out with a specific case regarding starting point of incident and, therefore, it can also be inferred that it was the prosecution side which was the aggressor and appellant no. 1 while exercising his right of private defence. Viewed from both the angles, it can safely be concluded that looking to the weapons used by the appellants and the seat of injuries suffered by the deceased, he had the intention to cause his death, but in the facts and circumstances, the case of appellant no. 1 would squarely be covered either under exception II or exception IV to section 300 of the IPC.

10.3. So far the prosecution evidence is concerned, we find some indication to the effect that initially there was exchange of words, which was resulted into physical fight between the two parties in which some persons on the side of the accused had also received injuries. The prosecution witnesses are not coming out with the true version as to how the incident actually happened. In the light thereof, the probability of complainant's side being aggressor cannot be ruled out. If that be so, appellant no. 1 and others had a right of private defence, but it also appears that that right was not to the extent of causing death of any of the members of the otherside. In that view of the matter, so far appellant no. 1 is concerned, it can be said that he had exceeded the right of private defence and hence his case would fall under exception II to section 300 of the IPC.

10.4. The second possibility of there being a sudden free fight cannot also be totally ruled out. In that case it is an admitted fact that appellant no. 1 had delivered only one blow which fell on the head of the deceased. It is also in evidence that on receiving this blow the deceased started running. However, there is no reliable evidence to the effect that appellant no. 1 even after causing the injury chased him to deliver more blows with Dhariya. In light of that evidence it can be said that appellant no. 1 in a sudden fight in the heat of passion and in sudden quarrel without having taken undue advantage or without having acted in a cruel or unusual manner, had caused injury to the deceased. That would again give the appellant no. 1 the protection aailable to him under the provisions of exception 4 to section 300 of the IPC. In our opinion, therefore, the Ld. trial Judge has committed error in holding that appellant no. 1 is guilty of committing an offence made

punishable u/S. 302 of the IPC. His conviction is, therefore, required to be altered from offence u/S. 302 to the offence made punishable u/S. 304 Part-I of the IPC. So far evidence with regard to both the appellants concerning causing injuries to the prosecution witnesses, we see that there is ample evidence to prove their guilt. The medical certificates brought on record show injuries suffered by Savitaben and others amply corroborate their ocular testimony and there is no reason for us to disbelieve their evidence on this count. We are, therefore, of the opinion that the trial Court has rightly convicted them for offence u/S. 324 of the IPC. They have also been convicted for the offence u/S. 135 of the Bombay Police Act, for which we do not see any reason to disagree with the trial Court.

11. In the result, we partly allow the appeal of appellant no. 1 and alter his conviction from offence u/S. 302 of the IPC to offence u/S. 304 Part-I of the IPC. It is stated by Mr. Budhbhatti at the bar that appellant no. 1 has already undergone about 11 years' imprisonment. In the facts and circumstances of the case, we find that the same is sufficient and the ends of justice would meet if we modify the sentence of imprisonment for life to the period already undergone by appellant no. 1. So far the conviction u/S. 324 of the IPC and u/S. 135 of the Bombay Police Act is concerned, we do not see any reason to interfere with the same and the same stands. With this modification, the appeal is partly allowed. It is directed that the appellant no. 1 be set at liberty forthwith if not required for any other purpose.

Muddamal articles to be disposed of in terms of the direction given by the Ld. trial Judge in the impugned judgment.

[K.R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.